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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

ET Docket No. 93-266

Review of the Pioneer's
Preference Rules

To: The Commission

REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.

NEXTEL COMMUNICATIONS, INC.

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I. INTRODUCTION

Nextel Communications, Inc. ("Nextel" formerly Fleet Call, Inc.) pursuant to Section 1.415 of the Rules and Regulations of the Federal Communications Commission (the "Commission"), respectfully submits its reply comments in the above-captioned proceeding.^{1/} In this proceeding, the Commission seeks comments on the continuing need for its pioneer's preference rules in light of Congress' recent enactment of competitive bidding authority to select licensees from among mutually exclusive applicants.^{2/}

In its original comments, Nextel agreed that the fundamental public policy purpose of the pioneer's preference rules -- overcoming the licensing risks, uncertainty and delay inherent in comparative hearings and lotteries^{3/} -- will be achieved through

^{1/} Notice of Proposed Rulemaking (the "Notice"), FCC 93-477, released October 21, 1993.

^{2/} See Section 6002 of the Omnibus Budget Reconciliation Act of 1993, 107 Stat. 387, enacted August 10, 1993 (the "Budget Act").

^{3/} See Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 6 FCC Rcd 3488 (1991) (the Pioneer's Preference Order); recon. 7 FCC Rcd 1808 (1992); further recon. den., 8 FCC Rcd 1659 (1993).

competitive bidding. By outbidding other applicants, a bidder/innovator has control over and a reasonable expectation of being licensed to provide the service derived from its innovation without undue delay -- thereby obviating the basis for awarding pioneer's licensing preferences.

Nextel applied for a preference for a 2 GHz Personal Communications Service ("PCS") license for the Greater Los Angeles area based on its development of Digital Mobile communications technology.^{4/} Nextel conceptualized and is constructing Enhanced Specialized Mobile Radio ("ESMR") systems using "Digital Mobile" technology in the ten largest and most frequency-congested metropolitan areas in the country.^{5/} Nextel's innovative Digital Mobile technology makes possible a seamless integrated advanced mobile communications network offering an optimum platform for broadband PCS while protecting existing licensees in a congested radio frequency environment.

^{4/} Request for a Pioneer's Preference in the Licensing Process for Personal Communications Services, Gen. Docket 90-314, PP-61, filed May 4, 1992 ("Fleet Call Request").

^{5/} See In re Request of Fleet Call, Inc. for Waiver and Other Relief to Permit Creation of Enhanced Specialized Mobile Radio Systems in Six Markets, 6 FCC Rcd 1533 (1991) (the "Fleet Call Waiver Order"), recon. den. 6 FCC Rcd 6989 (1991). Through its merger with Dispatch Communications, Inc. and other acquisitions, Nextel will hold authorizations to construct ESMR systems in the top 10 markets in the Nation covering more than 100 million persons.

II. DISCUSSION

A. The Pioneer's Preference Rules Should Be Repealed

Commenters from a broad segment of the mobile communications industry, including local exchange and interexchange carriers, cellular carriers, paging providers and other wireless carriers, agree that authorization of competitive bidding to select among mutually exclusive applicants obviates the public policy rationale for pioneer's preferences.^{6/} They state that with random chance removed from the license assignment process, there is no need to grant a preference to assure that an innovator can obtain a license. For example, Paging Network, Inc. observes that:

"With competitive bidding, the Commission effectively removes its regulatory process as a barrier between the innovator and the marketplace. The cost and uncertainty with the Commission sought to mitigate by adopting the pioneer's preference rules are virtually eliminated by competitive bidding."^{7/}

The commenters confirm that investors will make capital available to allow the best qualified party to prevail in spectrum auctions. Innovators can develop business plans incorporating the economic benefits of their innovations, such as enhanced efficiency, service quality, and/or lower costs, enabling them to value the license higher than competing bidders and bid

^{6/} See e.g., the Comments of BellSouth Corporation ("BellSouth"); Comments of GTE Service Corporation ("GTE"); Comments of Paging Network, Inc. (PageNet"); Comments of Southwestern Bell Corporation ("SWB").

^{7/} Comments of PageNet at p. 3.

accordingly.^{8/} Under competitive bidding, true pioneers will have an opportunity to participate in offering services resulting from their innovation "without the cumbersome and inevitably arbitrary process for governmental selection for pioneer's preferences."^{9/}

Small businesses and other "designated entities" will have access to PCS licenses through competitive bidding.^{10/} The Commission has proposed a number of mechanisms to assure that small businesses, women and minority-owned business, and rural telephone companies have access to PCS licenses. Thus preferences are not necessary to achieve these public policy goals.^{11/}

A number of commenters also assert that awarding preferences in a competitive bidding environment would devalue other PCS licenses given the competitive advantage bestowed on a preference holder by granting it a "free" license in advance of the regular licensing process. A pioneer's preference program that not only assures the preference holder a license, but a free license as well, goes far beyond the Commission's express purpose in adopting

^{8/} See Comments of BellSouth at p. 4.

^{9/} Comments of GTE at pp. 2-3. Similarly, PageNet states that the preference rules should be repealed because they simply replace one "daunting" regulatory process with another. Comments of PageNet at p. 7.

^{10/} See Implementation of Section 309(j) of the Communications Act Competitive Bidding, Notice of Proposed Rule Making, FCC 93-455, released October 12, 1993.

^{11/} Indeed, BellSouth maintains that these and other statutory objectives set forth by Congress for a competitive bidding program mandate elimination of the pioneer's preference rules. Comments of Bell South at pp. 5-7.

the pioneer's preferences and would create serious competitive imbalances.^{12/}

B. Comments Supporting Pioneer's Preferences are Unconvincing

Comments supporting retaining the pioneer's preferences were filed by the three broadband PCS pioneer's preference tentative selectees,^{13/} preference "hopefuls" in other services and equipment vendors.^{14/} They contend that competitive bidding will not per se promote innovation; i.e., that innovation will be fostered only if deserving pioneers have ". . . the certainty of obtaining an identifiable license to provide to the public the service they have pioneered. . ."^{15/}

Nextel respectfully disagrees. As discussed above, the auction process assures that who most value a resource have an opportunity to obtain it. In other words, the capital markets will make funds available to allow highly qualified parties (including innovators) to compete in competitive bidding.^{16/} In GTE's words, "The market would seek to make use of the qualifications of

^{12/} Comments of Pagemart, Inc. at p. 2.

^{13/} See e.g., Comments of American Personal Communications ("APC"), Cox Enterprises, Inc. ("Cox"), and Omnipoint Communications, Inc. ("Omnipoint").

^{14/} Comments of CELSAT, Inc; Comments of Motorola Satellite Communications, Inc; Comments of Qualcomm, Inc. ("Qualcomm").

^{15/} Comments of APC at p. ii.

^{16/} Innovators will attract financial support for participating in the competitive bidding process from financial institutions, venture capitalists or joint ventures or partnerships with other applicants that desire joining with the service innovator as well as its own financial resources.

technology leaders."17/

There have been important innovations in communications technology for many years without the necessity of pioneer's preference incentives; there will be future innovations regardless of the availability of pioneer's preferences. The pioneer's preference program was not intended to cure a lack of innovation per se, but only the specific licensing deficiencies of random selection uncertainty and comparative hearing delay. Competitive bidding corrects these problems without the competitive dislocations and speculative spur inherent in the pioneer's preference process.

The three tentative selectees for PCS broadband preferences each assert that they are entitled to a preference (i.e., a license) and that any revocation or modification of the pioneer's preference rules should not apply to them. While not questioning their contributions, although less than Nextel's, they are not entitled to a final preference simply because the Commission made them tentative selectees. The Commission explicitly stated that these preferences were not final pending comment and final Commission action.18/ Under the notice and comment rule making-type procedures involved, the Commission is free to revise, modify and even reverse its tentative conclusions based on the record

17/ Comments of GTE at p. 3.

18/ See Tentative Decision for Pioneer's Preference, Gen. Docket No. 90-315, 7 FCC Rcd 7794 (1992) at para. 2.

developed in response to its solicitation for comments.^{19/} The Commission may conclude that pioneer's preferences are no longer warranted and, concomitantly, that there is now no compelling public policy justification for awarding broadband PCS pioneer's preferences. Preferences are not intended -- and no record has been developed -- to guarantee preference holders substantially lower spectrum acquisition costs and a service headstart over competing licensees.

C. Preference Grantees Should Pay for their Licenses; Broadband PCS Preference Holders Should be Awarded a 10 MHz Basic Trading Area License

In the event the Commission finds that PCS licensing preferences should be granted, Nextel urges that preference holders be required to make an auction-equivalent payment for the license.^{20/} Many commenters support this position as consistent with the objectives of the pioneer's preference rules and as necessary to prevent undesirable anticompetitive impacts and to compensate the public for the use of the spectrum.^{21/}

If preferences are retained, a 2 GHz broadband PCS preference grantee should be awarded a single 10 MHz license for a single Basic Trading Area ("BTA") only, not for a multi-BTA license created by a combinatorial bid. The PCS tentative selectees desire 30 MHz Major Trading Area ("MTA") licenses. A 30 MHz license

^{19/} See Comments of SWB at n. 1.

^{20/} Comments of Nextel at p. 9.

^{21/} See e.g., Comments of SWB; Comments of NYNEX Corporation.

assignment, whether by preference or otherwise, would be unprecedented in land mobile history and no party in the PCS rule making proceeding has demonstrated a proposed service requiring a 30 MHz allocation. Awarding a 30 MHz MTA dispositive licensing preference is irreconcilable with the Commission's statutory obligation to promote spectrum efficiency in its licensing of mobile radio services.^{22/}

In its comments, Southwestern Bell supports this approach recommending that preference holders be awarded 10 MHz licenses in the BTAs where they have performed their PCS experiments.^{23/} SWB asserts that a 30 MHz license is unnecessarily generous and would make economic aggregation of such MTAs more difficult. A 10 MHz grant, ". . . gives the pioneer something of real value, which may be combined at auction with other licenses to create a larger or more powerful license if desired."^{24/}

D. If the Commission Awards 2 GHz Broadband PCS Pioneer's Preferences, it Must Grant Nextel's Application

As detailed in its original comments, Nextel is the unrivaled

^{22/} Section 332(a) of the Act. On November 18, 1993, Nextel filed a petition for reconsideration of the Commission's PCS allocation decision opposing 30 MHz and MTA allocations. Nextel is providing advanced, spectrally-efficient services using only 10 MHz of spectrum; unprecedented 30 MHz grants would remove any incentive to install efficient advanced technologies and waste spectrum that could be conserved for future uses.

^{23/} Comments of SWB at p. 7.

^{24/} Id. The three tentative selectees have recognized the reasonableness of a pioneer's preference for a one or two BTA area within the urban center of their requested MTA, in lieu of an MTA-wide preference, although they continue to request excessive 30 MHz assignments. See Comments of APC at p. 18; Comments of Cox at n. 4 and Attachment A; Comments of Omnipoint at n. 39.

pioneer in developing a highly-efficient, frequency-agile digital mobile communications technology platform for new 2 GHz PCS services.^{25/} Nextel's Digital Mobile technology is more innovative and effective than the Frequency Agile Sharing Technology developed by APC upon which the Commission found grant of a tentative preference warranted.^{26/} It is the first to offer an all digital, fully integrated mobile network combining advanced digital cellular telephone service, alphanumeric paging, two-way dispatch radio, data communications and full featured voice mail -- all accessible through a single compact subscriber unit. It incorporates "intelligent network" capabilities to permit customers to replace their cellular, pager and voice mail phone numbers with a single "Personal Telephone Number" that directs calls to wherever the subscriber is located. This service represents the essence of the ultimate PCS vision of personal mobility.

Finally, unlike every other PCS pioneer's preference application, Nextel has proven that *Digital Mobile is feasible by placing its first such system in day-to-day operation in Los Angeles last August.*^{27/} The Commission has already found

^{25/} See Fleet Call's Comments on the Tentative Decision which include a detailed discussion of why Nextel should receive a PCS licensing preference.

^{26/} Tentative Decision at paras. 7-11.

^{27/} Nextel supports Qualcomm's request that the Commission clarify that a pioneer's preference will be available for an innovation applicable to more than one service, provided the service in which preference is sought was not available at the time
(continued...)

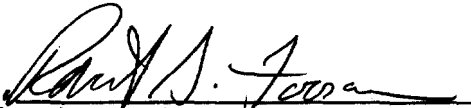
Nextel's Digital Mobile technology "unique" and "innovative."^{28/}
If the Commission decides to grant pioneer's preferences for
broadband PCS, Nextel's preference request must be granted.

V. CONCLUSION

The Congressional mandate to employ competitive bidding has
obviated the purpose of and need for pioneer's preferences. The
Commission should repeal these rules and should not finalize its
PCS 2 GHz broadband pioneer's preference tentative selections. As
PCS leaders, those entities will be able to effectively participate
in PCS auctions. If the Commission believes, however, that these
tentative grants should be finalized, it should award each
preference holder one 10 MHz BTA license only and grant Nextel's
PCS pioneer's preference license.

Respectfully submitted,

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November 22, 1993

^{27/}(...continued)
the preference request was filed. See Comments of Qualcomm at p.
7.

^{28/} Fleet Call Waiver Order at para. 11.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Comments of Nextel Communications, Inc. has been mailed by United States first class mail, postage prepaid, this 22nd day of November 1993, to the following:

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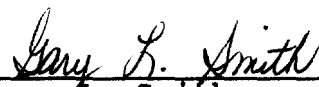
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